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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 984

HARRY S. STARK AND NATIONAL BANK OF DETROIT, CO-EXECUTORS OF THE ESTATE OF LOUISE TULLER MILLER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole issue presented by this income tax case is whether Finley P. Miller and Louise Tuller, both now deceased, were husband and wife during the years 1957–1959 as the result of an alleged common law marriage (Pet. 14a). If they were husband and wife, the advantages of filing joint income tax returns for those years would be available to them. In an attempt to sustain their burden of proving this factual issue, petitioners, the co-executors of Louise Tuller's estate, relied almost entirely upon an order entered by the Wayne County Probate Court which, as a part of the proceedings in the estate of Finley P. Miller, found "as a fact" that Louise Tuller and

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Finley Miller had been common law husband and wife. At the time this order was secured Mr. Miller's estate was hopelessly insolvent and both Mr. Miller and Louise Tuller were dead. The district court found that the only reason for securing such an order from the Probate Court was to enable Mr. Miller and Louise Tuller to file joint returns for prior years (Pet. 18a). Moreover, in the Probate Court proceeding both Mr. Miller's estate and Louise Tuller's estate were represented by the same law firm and no one appeared to oppose the contention that they had contracted a common law marriage (Pet. 16a).

Petitioners' contention is that, as a matter of law, the lower courts were required to accept the Probate Court determination as conclusive proof of the alleged marriage notwithstanding the facts that (1) the uncontested probate determination was gratuitous in the sense that it was unnecessary to effect the devolution of any property in Mr. Miller's insolvent estate (Pet. 16a, 18a), (2) the only purpose of securing the determination was for use in the instant tax suit (Pet. 18a), and (3) the record in the probate proceeding revealed that substantial evidence disproving the alleged marriage had not been introduced[1] and that the evidence that was introduced was incomplete and inherently unreliable (Pet. 17a–18a). Both courts below properly held that under the circumstances sur-

[1] For example, all of decedent's business papers which identified her as a single woman, and even her will drafted a month before Mr. Miller's death which described Mr. Miller as a "friend," were not introduced as evidence in the Probate Court (Pet. 15a, 22a).

rounding the entry of the order by the Probate Court they were not conclusively bound by that decree and that petitioners had failed otherwise to prove the existence of a common law marriage between Mr. Miller and Louise Tuller (Pet. 13a–24a).

The decision below is correct and there is no ground for further review.

1. Even though the United States was not a party to the probate proceedings and could not be bound under any theory of *res judicata* or collateral estoppel, petitioners argue that it must accept the uncontested factual determination of the Probate Court that the parties were married—no matter how overwhelming the evidence is to the contrary. Petitioners predicate this claim on two decisions of this Court dealing with the relationship between State law and the federal taxing statute. *Freuler* v. *Helvering,* 291 U.S. 35; *Blair* v. *Commissioner,* 300 U.S. 5. This Court has long recognized that "State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed." *Morgan* v. *Commissioner,* 309 U.S. 78, 80.

In *Freuler* this Court was called upon to construe a section of the Revenue Act of 1921 which provided that each beneficiary of a trust was taxable on that portion of the trust's annual income which was "distributable to" him:

> * * * pursuant to the instrument or *order* governing the distribution * * * whether or not distributed before the close of the taxable year * * * [*id.* at 40; emphasis supplied].

The Court held that in light of the specific provision of the Revenue Act involved and in the absence of any showing that the State court determination was "collusive in the sense that all parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional * * * tax" (*id.* at 45), the State court's determination that depreciation on trust property was to be deducted prior to distributing the income to the income beneficiaries prevented the Commissioner from taxing the beneficiaries on the gross (undepreciated) income of the trust. In *Blair*, the State appellate court's determination that an interest in a trust was assignable was held to prevent the Commissioner from taxing the assignor on the theory that he had a non-assignable interest in a spendthrift trust. Neither *Freuler* nor *Blair* present a basis for arguing that the federal government is bound by an uncontested and gratuitous factual determination made in the course of court proceedings to which it was not a party.

2. While we agree with petitioners that there appears to be a disagreement in principle among several appellate courts with respect to the effect of State court decrees in federal tax cases, such disagreement as exists involves questions that are unrelated to the question presented by the instant case and review of the instant case would in no way serve to resolve that apparent conflict.

Since *Freuler* and *Blair* there have been a number of appellate court decisions involving the effect to be given to non-adversary legal and factual determinations of

State courts which affect the property subject to tax. All courts would seem to agree that if a State court awards property to A rather than to B, the federal government could not tax the subsequent income to B no matter how insubstantial A's claim to ownership might have been. On the other hand, when the federal question turns, not on who owns the property, but on how he got it, there may be a disagreement among the appellate courts as to the effect that should be given the grounds of decision stated by a State court in a non-adversary proceeding involving the property subject to tax. This question has been most prevalent in estate tax cases where the incidence of tax often turns on whether the decedent's surviving spouse acquired the property from the decedent or through the inaction of other beneficiaries. See 1954 Code § 2056. In such circumstances, most courts have independently examined State law to determine whether the non-adversary nature of the proceedings have resulted in a decree that is in conflict with such law. See, *e.g.*, *Second National Bank of New Haven* v. *United States*, 351 F. 2d 489 (C.A. 2); *Pierpont* v. *Commissioner*, 336 F. 2d 277 (C.A. 4), certiorari denied, 380 U.S. 908; *Stallworth's Estate* v. *Commissioner*, 260 F. 2d 760 (C.A. 5); *Flitcroft* v. *Commissioner*, 328 F. 2d 449 (C.A. 9); *In re Sweet's Estate*, 234 F. 2d 401 (C.A. 10). On the other hand, at least one circuit appears to require collusion in the nature of fraud before it will make its own independent examination of the issues involved. *Gallagher* v. *Smith*, 223 F. 2d

218 (C.A. 3); *Babcock's Estate* v. *Commissioner*, 234 F. 2d 837 (C.A. 3); *Beecher* v. *United States*, 280 F. 2d 202 (C.A. 3); *Darlington's Estate* v. *Commissioner*, 302 F. 2d 693 (C.A. 3). However, even that circuit would not accord conclusive effect to a State court decree where, as here, the decree did not relate to property interests previously adjudicated in the State court proceeding. *Dauphin Deposit Trust Co.* v. *McGinnis*, 324 F. 2d 458 (C.A. 3).

Both lower courts correctly held that the State Probate Court's gratuitous determination of an unnecessary factual issue (the marital status of two deceased individuals) which had been secured in a non-adversary proceeding solely for use as evidence in the instant federal tax case is not conclusive evidence against the federal government.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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